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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 694

E. H. ALBRECHT, *et al.*,
Petitioners,

vs.

INDIANA HARBOR BELT RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND SUPPORTING BRIEF.

JOHN H. GATELY,
Counsel for Petitioners.

JOSEPH F. BURNS,
Of Counsel.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

SUBJECT INDEX.

	PAGE
Petition for writ of certiorari	1-7
A. Summary and short statement of the matter involved	2
B. Statement of the basis upon which it is contended that this Court has jurisdiction to reverse the judgment of the Court of Appeals for the Seventh Circuit	4
C. The questions presented	6
D. Reasons relied on for the allowance of the writ	7
Brief in support of petition	9-15
I. Report of opinion	9
II. Statement of grounds on which jurisdiction of this Court is invoked	9
III. Statement of the case	10
IV. Specification of assigned errors intended to be urged	10
V. Argument	11-14
Conclusion	21

TABLE OF CASES CITED.

Cleapor v. Atlantic, B. & C. R. Co., 123 F. 2d 374..... 12
Conductors Benefit Association v. Loomis, 142 Ill. 560 13
Economy Fuse & Mfg. Co. v. Raymond Concrete Pile Co., 111 F. 2d 875..... 14
Electrical Contractors Association of the City of Chicago v. A. S. Schulman Electric Co., 391 Ill. 333.... 14
Emma Jones, et al. v. Supreme Lodge Knights of Honor 236 Ill. 113..... 14
H. J. Heinz Co. v. N. L. R. B., 311 U. S. 514..... 12
Howard v. C. B. & Q. Ry., 146 F. 2d 316..... 12
J. I. Case v. N. L. R. B., 321 U. S. 332..... 14
Kordewick v. Indiana Harbor Belt R. Co., 157 F. 2d 753 13
Novosk v. Reznick, 323 Ill. App. 544..... 13
Order of Conductors v. Pitney, 326 U. S. 561..... 12
Sanders v. L. & N. Ry. Co., 144 F. 2d 485..... 12
Union Pacific R. Co. v. Olive, 156 F. 2d 485..... 12

AUTHORITIES.

17 C. J. S. 519 Sub. Par. (d)..... 13

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To the Honorable, The Supreme Court of the United States:

Your Petitioners, E. H. Albrecht, and others, respectfully represent that they are aggrieved by the final judgment of the United States Court of Appeals for the Seventh Circuit, entered December 20, 1949, (R. 26) affirming the judgment of the District Court of the United States for the Northern District of Indiana, Hammond Division, dismissing, on motion, the Complaint filed by these Petitioners (R. 1).

A.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

In the Complaint filed in the District Court of the United States for the Northern District of Indiana, Hammond Division, on the 4th day of August, 1947 (R. 1) the Petitioners alleged diversity of citizenship and sought recovery of damages for violation of the labor agreement entered into by the defendant and the Brotherhood of Railroad Trainmen on behalf of Petitioners, who are members of the Brotherhood. The Petitioners claim a violation of the labor agreement by the Respondent based upon a breach of Article VII (R. 7) of said agreement, wherein the respondent agreed to provide a foreman and two helpers as a regular yard crew in their switching yard in the Chicago switching district. The Respondent did not provide the number of men specified. The respondent's main office is in Hammond, Indiana, and the suit was therefore brought in the District Court in Indiana.

The violations of said agreement originated August 13, 1926, and continued through December 12, 1938. The Complaint charges that by reason of the Respondent's failure to provide a full crew, as specified in said agreement, the Petitioners were prevented from working said period and they thereby lost a day's pay for each day that the railroad continued said violation of said agreement.

That in conformance with said agreement, Article XXIV thereof (R. 7) the Petitioners and the officials of their local brotherhood lodge, in accordance with the National Railway Labor Act and said agreement, presented their grievances for said violation and claims for pay for said period;

that said claims were negotiated by the proper officials of their Brotherhood, with the proper officials of the Respondent, without satisfaction, from September 24, 1926, and because of their failure to adjust their differences, a Petition was filed with the Board of Adjustment, and lapsed with the expiration of said Board.

Count 2 of the Complaint (R. 5) states that the Respondent, by reason of its failure to abide by Article VII *supra,* required some of Petitioners to perform two assignments of work on several days they worked and they were therefore required to work a longer period of time on their shifts than scheduled, and only received pay for the work done on one shift, and that they are therefore entitled, under said agreement, to an additional day's pay, in accordance with Article II, Sub. Par. (b) (R. 6). The Respondent filed a Motion to Dismiss (R. 10) and challenged the sufficiency of the Complaint, and among other things, set out their objections that the action was not commenced within the six (6) year Statute of Limitations of Indiana, contending that the claims were predicated upon an oral, rather than a written contract.

Briefs were filed and oral arguments were held and Petitioners objected to the inclusion of the plea of the Statute of Limitations in a motion to dismiss, which was overruled.

On December 16, 1948, the trial court entered its memorandum of opinion (R. 11) and its order of dismissal (R. 14). The whole opinion was based upon the Court's assumption that the plea of the Statute of Limitations is properly cognizable in a motion to dismiss, and that the contract of employment was not a written contract (R. 14).

B.

STATEMENT OF THE BASIS UPON WHICH IT IS CONTENDED THAT THIS COURT HAS JURISDICTION TO REVERSE THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The jurisdiction of this Court to grant a Petition for a writ of certiorari is invoked under Section 1254 of the Judicial Code, as amended by the Act of September 1, 1948 (28 USCA 1254).

The time for filing this Petition for a writ of certiorari begins from the date of the final decision, viz. December 20, 1949.

The Opinion of the Court of Appeals, and the decision thereon misapplies the correct interpretation given to contracts between Labor Unions and employers, as handed down by the highest courts of the State of Illinois, and misapplies such fallacious conclusions to the contract involved in this case. They also, in said decision, failed to take into consideration the provisions of the National Railway Labor Act, which require long negotiation between the representatives of the employees, the Petitioners herein, and the duly constituted officials of the Railroad, Respondent herein. They have also failed to take cognizance of, and recognize opinions of other United States Courts of Appeal in other cases involving interpretation of identical labor contracts, which have held the same to be written contracts, and have applied the Statute of Limitations of Indiana on oral contracts to this action, instead of the Statutes of Limitations of Indiana governing contracts.

The issues in this case necessitate a construction of the Railway Labor Act and the intent and purpose of Congress in enacting the same. By this decision they have gone directly opposite to the expressed opinion of this court in similar cases.

The question as to whether or not valid and subsisting negotiated collective bargaining agreements entered into by and between the duly constituted representatives of employees with the officials of the Railroad shall be treated as *nudum pactums* requiring no more consideration than a nod of the head, or whether they should be given their true value, as this Court in some of its opinions has so aptly stated they should be treated as treaties and accorded recognition with solemnity due them, must be passed upon by this court.

If the decision of the Court of Appeals in this case is not reversed, collective bargaining will be held for naught, and the whole structure of the Railway Labor Act will be destroyed and its full intent and purpose as enunciated by Congress under the Act, and as interpreted by this Court, will be a nullity. Railroads will find it impossible to conduct their operations, and employees will know that they cannot proceed with their bargaining processes set up by the Railway Labor Act, for to do so would jeopardize their rights to final appeal to the courts.

This court should exercise its jurisdiction by granting this Petition for writ of certiorari, not merely to determine whether the Court of Appeals improperly applied the formal principles, as enunciated by the Railway Labor Act, but also to correct them in their mis-application of stated State Law, and for the purpose of pronouncing legal principles that should be applied by all courts in the land with regard to controversial rights contained in collective bargaining agreements. The question presented by this Petition relates to the basic principles that should be ap-

plied by courts generally when negotiated collective bargaining agreements, upon which this action is based, are brought into court to prevent the complete nullification of the intent and spirit of the Railway Labor Act. The question is substantially clear, urgent and extremely important to hundreds of thousands of men who are now working under what they consider written contracts, which the Court of Appeals has perfunctorily labeled oral contracts and denied them right of redress they thought assured thereunder. This should be finally determined by this Court by granting this Petition for a writ of certiorari.

C.

THE QUESTIONS PRESENTED.

The questions presented, we respectfully submit, have been enunciated in the previous section, and which might be stated more succinctly, as whether or not negotiated collective bargaining agreements entered into between the representatives of the men and the duly constituted officials of the employer, and formally reduced to writing and signed by the representatives, are written or oral agreements insofar as the Statute of Limitations is to be applied by the Courts in actions brought for breach of any of the provisions of said agreements.

D.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

The decision of the Court of Appeals in this case conflicts with the decision of this Court, and of other Courts of Appeals. There should be uniformity of decision relating to the interpretation of these collective bargaining agreements. Their worth and status should be clear and certain. The rights and liabilities of thousands of men and hundreds of companies are dependent upon the final determination of this Court of the issues presented and should be resolved by this Court by granting this Petition for writ of certiorari.

Respectfully submitted,

E. H. ALBRECHT, *et al.*,
Petitioners,

JOHN H. GATELY,
Counsel for Petitioners.

JOSEPH F. BURNS,
Of Counsel.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

REPORT OF OPINION.

The opinion of the Court of Appeals (R. 26) is reported in 178 F. 2nd 577.

II.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

The grounds are more particularly set forth in Paragraph B of the preceding Petition.

III.

STATEMENT OF THE CASE.

The concise statement of the case is made in the preceding Petition under Paragraph A.

IV.

SPECIFICATION OF ERRORS ASSIGNED AND INTENDED TO BE URGED.

The Court of Appeals erred:

1. In affirming the judgment of the District Court.

2. In not reversing the judgment of the District Court in favor of your Petitioners.

3. In holding that the Statute of Limitations can be passed upon in a motion to dismiss.

4. In rendering its decision that collective bargaining agreements entered into by and between the duly constituted officials of the Brotherhood of Railroad Trainmen, and the officers of the Railroad, Respondents herein, which have been formally reduced to writing and signed by the parties, are oral contracts and the Statute of Limitations pertaining to oral contracts applies thereto.

V.

ARGUMENT.

A.

The Plea of the Statute of Limitations Should Not be Considered Under a Motion to Dismiss.

The Court of Appeals has erroneously found that a plea of a Statute of Limitations can properly be considered under a motion to dismiss and found that on the face of the pleadings it is obvious that the action was brought after the running of the statute. In this particular case there are eleven (11) Petitioners who were in the armed services of the United States, Army or Navy, and under the Soldiers and Sailors Relief Act of 1940, and the amendments thereof, Section 205, excludes the period of military service from computing time under existing or future Statutes of Limitation.

We respectfully submit that this evidence cannot be brought out on a motion to dismiss, and that therefore the only proper way, as set forth through the years, of raising a Statute of Limitations is by plea so that a reply may be made and questions that might have tolled the statute, which do not appear on the face of the complaint, can be raised.

We respectfully submit, therefore, that the decision of the Court of Appeals on this matter must be reversed.

B.

The Decision of the Court of Appeals Conflicts With the Decisions of This Court and Other Courts of Appeal.

Most recently this Court, in *Order of Conductors* v. *Pitney,* 326 U. S. 561 (at page 569, Note 2), has recognized that a similar collective bargaining agreement is a written contract; so, too, in *H. J. Heinz Co.* v. *N. L. R. B.,* 311 U. S. 514, wherein they state at page 525:

> "We think that Congress in their incorporating in the new legislation the collective bargaining requirement of the earlier statute, included as a part of it the signed agreement long recognized under the earlier acts as the final step in the bargaining process."

And many other similar cases have so held.

Other courts of appeals of other circuits, passing upon similar contracts in states having similar laws to the State of Illinois, have held that these contracts are written contracts and must be so interpreted when considering a plea of the Statute of Limitations.

In *Cleapor* v. *Atlantic, B. and C. R. Co.,* 123 Fed. 2nd 374, the Court there stated, at page 376, that it was a written contract.

Also in *Howard* v. *C. B. & Q. Ry.,* 146 F. 2nd 316, at page 320, the Court there recognized practically an identical contract as being a written contract.

In *Union Pacific R. Co.* v. *Olive,* 156 F. 2nd 737, wherein an action on a collective agreement was challenged by a plea of the Statute of Limitations, at page 738, the Court held the same to be a contract application or liability founded upon an instrument in writing.

This same interpretation was also given similar contracts in the case of *Sanders* v. *L. & N. Ry. Co.,* 144 F. 2nd 485.

C.

The Decision of the Court of Appeals Conflicts With the Decisions of the Supreme Court of Indiana and Illinois.

The case relied upon by the Court of Appeals, namely, *Kordewick* v. *Indiana Harbor Belt R. Co.*, C. C. A. 7th Cir. (1946), 157 F. 2nd 753, is based upon the Illinois cases that the Court has misinterpreted, because in the case of *Novosk* v. *Reznick*, 323 Ill. App. 544, the truck driver who had had no duly constituted, elected representative enter into any negotiated contract for and on his behalf, as we have in the instant case, sought pay by a ruling of the W. P. A.; there was no privity between the truck driver and the W. P. A., only the W. P. A. and the employer. These are not the facts in the instant case. The Court pointed out that it is not necessary under Illinois law that a person to be benefited by a contract be named therein if he is otherwise designated, or he may be even one of a class of persons if the class is sufficiently described or designated.

So, too, in the case of *Conductors Benefit Association* v. *Loomis*, 142 Ill. 560; the Supreme Court of Illinois there held that a written contract is one which in all its terms is in writing, and the Court passed upon the fact that the certificate of membership and constitution and by-laws could constitute a written contract, but in that case the certificate merely stated that the injured is a member of the association and contains no promise to his wife or widow. In the instant case, the written contract was signed by the officials of the Brotherhood, for and on behalf of the named class and ostensibly and obviously for the benefit of the Petitioners in the instant case.

This enunciation upheld in 17 C. J. S. 519 Sub. Par. (d).

It is respectfully submitted that the Court of Appeals

in *Economy Fuse & Mfg. Co.* v. *Raymond Concrete Pile Co.*, 111 F. 2nd 875, at p. 878, states that it is not the law of Illinois that a cause of action upon a written contract is taken out of that class by reliance upon evidence of surrounding circumstances, and we respectfully submit that is the most we intended to use in the instant case.

Illinois also recognizes in the case of *Emma Jones, et al.* v. *Supreme Lodge Knights of Honor*, 236 Ill. 113, in an action on a benefit certificate issued by a society of which the deceased was a member, that the application, the constitution and by-laws, and certificate constituted a contract. They held that these evidences were in writing and that no verbal testimony was necessary to establish the contract. This was later affirmed in *Electrical Contractors' Association of the City of Chicago* v. *A. S. Schulman Electric Co.*, 391 Ill. 333, which we believe is the latest expression in Illinois on this subject. In the instant case we contemplate introducing the application for memberhsip in the Brotherhood of Railroad Trainmen, the membership certificate, by-laws and constitution of the Brotherhood, and the written collective bargaining agreement under which the employees have worked for the Respondent for many years, and we reiterate that this constitutes a compliance with the Statute of Frauds, and that the Statute of Limitations pertaining to oral contracts does not apply.

In the case of *J. I. Case* v. *N. L. R. B.*, 321 U. S. 332, at p. 335, the Court recognizes that after the collective trade agreement is made, the individuals which will benefit by it are identified by individual hirings and this Court also finds in the next paragraph that the employee becomes entitled by reason of the Labor Relations Act, which we submit in this instant case, gives the same rights as the Railway Labor Act, somewhat as a third party beneficiary to all benefits to the collective trade agreement.

Conclusion.

This Court is well aware of the prolonged negotiations that are a natural concomitant of bargaining between employers and employee representatives. They are also aware of the extreme delicacy in the relations that exist between the two, and they are aware of the conscientious and painstaking handling of these matters by Congress and the National Railway Labor Act, wherein they so assiduously sought to set up a means of allaying interruptions to commerce and provided for peaceful settlement of unavoidable differences. This Court in many of the cases submitted to it has been most conscientious in its endeavor to preserve the obvious intentions of Congress by adhering to the spirit, as well as the letter, of the Railway Labor Act. Now all this is held for naught. All negotiations, legislation and decisions are annihilated if these contracts are not given their rightful place, for well this Court knows, the tedious, long negotiation and delay that prevents acrimonious action while negotiating to arrive at a peaceable settlement. If then these employees only have a nod of the head and not even a wisp of paper, then why should they go through the laborious, long drawn out procedure provided by the Railway Labor Act. Then, either let them go to Court immediately to avoid the deadly axe limitations, or let them strike, and tie up the nation's arteries. The decision is in your hands.

Respectfully submitted,

JOHN H. GATELY,
Counsel for Petitioners.

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Of Counsel.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX.

	PAGE
Opinion Below	1
Jurisdiction	1
Question Presented	1-2
Statement of the Case	1
Summary of Argument	4
Argument	5
I. The Circuit Court of Appeals correctly interpreted Rule 12(b)(6) of the Rules of Civil Procedure	5
II. The Circuit Court of Appeals followed correctly the applicable Illinois law	13
Conclusion	13

Table of Authorities.

Cases.

A. G. Reeves Construction Co. v. Weiss, C. C. A. 6th Cir. (1941) 119 F. 2d 472	6
Abram v. San Joaquin Cotton Oil Co., U. S. D. C. S. D. Cal. (1942), 46 F. Supp. 969	6
Anderson v. Linton, C. C. A. 7th Cir. (1949) ..... F. 2d	6
Barnhart v. Western Maryland Ry. Co., U. S. D. C. Md. (1941), 41 F. Supp. 980	6
Berry v. Chrysler Corporation, C. C. A. 6th Cir. (1945), 150 F. 2d 1002, 1003	6
Cleapor v. Atlantic, B and C. R. Co., 123 F. 2nd 374	11
Conductors' Benefit Assoc. v. Tucker, 157 Ill. 194, 205	8

Economy Fuse & Mfg. Co. v. Raymond Concrete Pile Co. (1940), 111 F. 2nd 875 12

Electrical Contractors' Association of the City of Chicago v. A. S. Schulman Electric Co., 391 Ill. 333 12

Ellithorpe v. Holmes, 305 Ill. App. 625 8

Erie Railroad Co. v. Tomkins (1938), 304 U. S. 64; 58 S. Ct. 817 13

Gerard v. Mercer, D. C. D. Mon. (1945), 62 F. Supp. 28 6

Gossard v. Gossard, C. C. A. 10th Cir. (1945), 149 F. 2d 111, 113 6

Gronowski v. Jozefowicz, 291 Ill. 266, 277 8

H. J. Heinz Co. v. N. L. R. B., 311 U. S. 514 11

Hartford-Empire Co. v. Glenshaw Glass Co., U. S. D. C. W. D. Pa. (1942), 47 F. Supp. 711 6

Howard v. C. B. & Q. Ry., 146 F. 2d 316 11

Huddleston v. Dwyer, 322 U. S. 232, 237 13

Jacksonville Hotel Bldg. Corp. v. Dunlap Hotel Co., 264 Ill. App. 279, 323 8

Jones, Emma, et al. v. Supreme Lodge Knights of Honor (1908), 236 Ill. 113 12

Kordewick v. Indiana Harbor Belt R. Co., C. C. A. 7th Cir. (1946), 157 F. 2d 753 .....5, 6, 7, 12

Moore v. Illinois Cent. R. Co. (1941), 312 U. S. 630 ... 13

Mowatt v. City of Chicago, 292 Ill. 578, 582 .....7, 8, 9

Murphy v. Cicero Lumber Company, 97 Ill. App. 510, 516 8

Novosk v. Reznick (1944), 323 Ill. App. 544, 551 .7, 8, 10, 11

Order of Conductors v. Pitney, 326 U. S. 561 11

Order of Railroad Conductors v. Southern Railway Company, ... U. S. 13

Orminski v. Hyland Electrical Supply Co. (1945), 326 Ill. App. 392, 398 .....7, 10

Railway Passenger and Freight Conductors' Mutual Aid and Benefit Association v. Loomis, 142 Ill. 560 (1892) 7, 11, 12

Richey v. Northwestern University, 323 Ill. App. 293 . 8

Rittenhouse & Embree Co. v. Barry, 98 Ill. App. 548, 554 8

Sanders v. L. & N. Ry. Co., 144 F. 2d 485 11

Slocum v. D., L. & W. R. Co., ... U. S. 13

Speich v. A., T. & Santa Fe Ry. Co., 178 Ill. App. 266, 272 8

Union Pacific R. Co. v. Olive, 156 F. 2d 737 11

Wright v. Bankers Service Corp. (1941), D. C. S. D. Cal., 36 F. Supp. 980 6

FEDERAL RULES OF CIVIL PROCEDURE.

F. R. C. P., Rule 12(b)(6) 5

F. R. C. P., Rule 9(f) 6

STATUTES.

Burns Indiana Statutes (1933), Sec. 2-601 12

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OPINION BELOW.

The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported in 178 F. 2nd at page 577.

JURISDICTION.

Petitioners seek to invoke jurisdiction under Section 1254 of the Judicial Code.

STATEMENT OF THE CASE.

Petitioners, for and on behalf of themselves and those similarly situated, filed this action in the District Court, for the Northern District of Indiana, Hammond Division,

on August 4, 1947, invoking jurisdiction on the ground of diversity of citizenship (R. 1). By their complaint, and upon two counts, they seek damages for breach of a contract between Respondent and the Brotherhood of Railroad Trainmen, an unincorporated labor organization. Under the theory of the first count, damages are claimed of Respondent for failing to provide work which the Petitioners were ready and willing to do. Under the second count, Petitioners allege that Respondent, in violation of its contract, required Petitioners to perform two different types of work, on the days which they did work, while paying them for only one full day's work for each working day.

Petitioners admittedly are not parties to the contract, but sue as beneficiaries thereof. The contract was executed in Chicago, Illinois, on December 20, 1919. It governs wages, hours, and working conditions of yardmen working in Illinois. The alleged violations occurred in Illinois over a period of from August 13, 1926, to and including December 12, 1938. It thus appears on the face of the complaint that the contract is to be interpreted under Illinois law. It affirmatively appears also that the last day of violation occurred approximately nine years and eight months prior to the filing of this suit (R. 1 through 10, inclusive).

The District Court, in dismissing the complaint on Respondent's motion, rendered a memorandum opinion (R. 11 through 14, inclusive). The judgment of the District Court was affirmed on December 20, 1949, by the Circuit Court of Appeals for the Seventh Circuit, with an opinion by Circuit Judge Duffy (R. 26-28).

Both the District Court and the Circuit Court of Appeals properly held that the laws of Illinois govern the legal interpretation of the contract sued upon, and that under Illinois law the contract is in legal effect an oral contract because parol evidence would have to be introduced to identify the parties and maintain the action. Since more

than six years had elapsed between the date of the last alleged breach and the commencement of the action, it affirmatively appears that the complaint does not state a claim upon which relief can be granted because of the Indiana statute of limitations governing actions for breach of contracts not in writing.

SUMMARY OF ARGUMENT.

I.

The first question presented is a procedural one, *i. e.*, whether or not the Statute of Limitations can be raised by way of motion to dismiss under the Rules of Civil Procedure. The complaint shows upon its face that it was filed approximately nine years and eight months after the last alleged violation. The law of the forum (Indiana) provides that actions upon contracts not in writing shall be commenced within six years after the cause of action accrued. The bar, therefore, clearly appears on the face of the pleading, and the complaint fails to state a claim upon which relief can be granted.

II.

The present suit is a common law action for breach of contract. The contract sued upon is partly in writing and partly oral. Since it was executed in Illinois, performed in Illinois, and the alleged breaches occurred in Illinois, the laws of Illinois govern its interpretation. Under the law of Illinois, a contract partly in writing and partly oral is in legal effect an oral contract. Since the Federal Courts apply the Statute of Limitations, as interpreted by the highest courts of the state where the action is brought, the action is barred by the Indiana 6-year Statute of Limitations.

ARGUMENT.

At the outset, Respondent calls attention to the fact that the questions herein sought to be reviewed were decided by the Circuit Court of Appeals not only in the present case, but in the case of *Kordewick, et al.* v. *Indiana Harbor Belt R. Co.*, C. C. A. 7th Cir. (1946), 157 F. 2nd 753. The same contract and the same alleged breaches are involved in this case that were involved in the *Kordewick* case. While the named plaintiffs in the *Kordewick* case are different they are members of the same union, that is, the Brotherhood of Railroad Trainmen, and are plaintiffs in this suit in the sense that they are members of the class which Petitioners purport to represent. They would participate, under the theory of the complaint, in the proceeds of any judgment rendered (see complaint, rhetorical paragraphs 9, 10, 11, and 12, R. 3 & 4). This Honorable Court denied certiorari in the *Kordewick* case on January 13, 1947. *W. G. Kordewick, etc., Petitioners* v. *Indiana Harbor Belt R. Co.* (1947), 329 U. S. 806, 67 S. Ct. 502.

I.

Petitioners make no mention of the procedural question in their petition. Consequently, it has been waived. Under the argument portion of the supporting brief, it is asserted that the time during which eleven of the Petitioners were members of the armed services should be deducted in applying the Statute of Limitations (Petitioners' Brief, page 11). There is nothing in the record to support such a statement, if it be a fact. In addition, no authorities are offered in support of Petitioners' legal contention.

Rule 12(b)(6) of the Rules of Civil Procedure provides

that a complaint may be attacked by motion for "failure to state a claim upon which relief can be granted". Rule 9(f) provides: "For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter." Petitioners, having pleaded the time of the breach (August 13, 1926, to and including December 12, 1938) like all other averments of material matter, have failed to state a claim upon which relief can be granted because they have failed to present their claim within the six years during which the law affords a remedy. It affirmatively appears that the claim, if any, is outlawed. Therefore, no relief can be granted.*

II.

Petitioners' action is a common law action for breach of a contract known as "Chicago Memorandum Agreement" executed in Chicago, Illinois, on December 20, 1919, between the Brotherhood of Railroad Trainmen and the Gen-

* The propriety of raising the Statute of Limitations by motion to dismiss has been approved in the following cases:

Anderson v. *Linton,* C. C. A. 7th Cir. (1949) 178 F. 2d 304.

Kordewick v. *Indiana Harbor Belt R. Co.,* C. C. A. 7th Cir. (1946), 157 F. 2d 753.

Gossard v. *Gossard,* C. C. A. 10th Cir. (1945), 149 F. 2d 111, 113.

Berry v. *Chrysler Corporation,* C. C. A. 6th Cir. (1945), 150 F. 2d 1002, 1003.

A. G. Reeves Construction Co. v. *Weiss,* C. C. A. 6th Cir. (1941), 119 F. 2d 472.

Abram v. *San Joaquin Cotton Oil Co.,* U. S. D. C. S. D. Cal. (1942), 46 F. Supp. 969.

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Barnhart v. *Western Maryland Ry. Co.* U. S. D. C. D. Md. (1941), 41 F. Supp. 980.

Gerard v. *Mercer,* D. C. D. Mon. (1945), 62 F. Supp. 28.

Wright v. *Bankers Service Corp.,* D. C. S. D. Cal. (1941), 39 F. Supp. 980.

eral Managers Committee (R. 6, page 7). The breaches allegedly occurred at the Blue Island, Illinois, yard over a period of from August 13, 1926 to December 12, 1938. Petitioners are not parties to the contract. Parol evidence would be necessary to show a contractual relationship between Petitioners and Respondent, that they (Petitioners) are or were employed by Respondent, that they were or are members of the union, that they were employed in the type of work covered by the agreement, and that they worked within the Chicago Switching District covered by the agreement (R. 2-9, inclusive).

Petitioners apparently admit that the contract is to be interpreted according to the law of the State of Illinois (Petition, page 4, and supporting brief, pages 13 and 14) but contend that the Circuit Court of Appeals refused or failed to interpret the Illinois law correctly. The question then resolves itself merely into an investigation as to what the applicable decisions of the Illinois Appellate and Illinois Supreme Courts are.

The court below, having already passed on the identical contract in the *Kordewick* case, *supra*, determined that under Illinois law the contract is, in legal effect, an oral contract because parol evidence would have to be introduced to identify the parties and maintain the action. In the *Kordewick* case the Circuit Court of Appeals cited and followed four Illinois decisions: *The Railway Passenger and Conductors' Benefit Ass'n.* v. *Loomis*, 142 Ill. 560; *Mowatt* v. *City of Chicago*, 292 Ill. 578; *Novosk* v. *Reznick*, 323 Ill. App. 544; and *Orminski* v. *Hyland Electrical Supply Co.*, 326 Ill. App. 392.

The Railway Passenger and Freight Conductors' Mutual Aid and Benefit Association v. *Loomis*, 142 Ill. 560 (1892), is a leading case in Illinois on the question here involved, and has been cited and followed many times by Illinois

courts.* That was an action by plaintiff to recover benefits claimed to be due by reason of the death of her husband. The only question considered by the court was whether the action was barred by the five year limitation statute. The court pointed out that if there were a written contract it would consist of the certificate of membership of plaintiff's deceased husband and the constitution and by-laws of defendant. The certificate certified that H. H. Loomis was a member of the association. It did not mention his wife, the plaintiff, nor did the constitution and by-laws refer to her in any way. In holding that the action was barred by the five year statute the court said:

> "It is clear, therefore that parol testimony must be resorted to, in order to connect the plaintiff with the contract as a party thereto. It must be shown by parol evidence, that Loomis did not leave a will, and that he did leave a widow, and that plaintiff is his widow.
>
> A contract cannot be said to be in writing, unless the parties thereto, as well as the terms and provisions thereof, can be ascertained from the instrument itself. If the party to a written contract is not named therein, the contract is defective as containing only a part of the agreement. In such case, the agreement is only partly reduced to writing, because parol proof must be resorted to, in order to show with whom the bargain was made" (p. 567). * * *
>
> But the constitution and by-laws merely designate in a general way certain classes of persons, who will

* Among such cases are *Conductors' Benefit Assoc.* v. *Tucker*, 157 Ill. 194, 205; *Gronowski* v. *Jozefowicz*, 291 Ill. 266, 277; *Mowatt* v. *City of Chicago*, 292 Ill. 578, 582; *Murphy* v. *Cicero Lumber Company*, 97 Ill. App. 510, 516; *Rittenhouse & Embree Co.* v. *Barry*, 98 Ill. App. 548, 554; *Speich* v. *A. T. & Santa Fe Ry. Co.*, 178 Ill. App. 266, 272; *Jacksonville Hotel Bldg. Corp.* v. *Dunlap Hotel Co.*, 264 Ill. App. 279, 323; *Ellithorpe* v. *Holmes*, 305 Ill. App. 625; *Richey* v. *Northwestern University*, 323 Ill. App. 293; *Novosk* v. *Reznick*, 323 Ill. App. 544, 551.

> be entitled to the benefit fund upon the death of a member; and parol evidence must be introduced to show that the plaintiff belongs to one of the designated classes. It must be proven by parol, not that the plaintiff is the particular person named in a certain writing, but that she possesses the qualifications which, under the constitution and by-laws, all persons must possess, who are entitled to receive the benefit fund. Hence, the written contract here sought to be set up is defective in necessitating the introduction of parol testimony in order to make it complete'' (pp. 568-569).

Plaintiff in the above case was barred by the five year statute because, not being named in the written instrument, she had to show by parol that she possessed the qualifications to entitle her to the benefit of the contract. Petitioners in the case at bar must also do that. They would have to show by parol that they possess the qualifications to entitle them to any benefits of the agreement upon which they rely. They would have to show by parol the existence of any contractual relationship whatsoever between them and respondent.

In *Mowatt* v. *City of Chicago,* 292 Ill. 578, the court held that, conceding the action to be based on the ordinance in question, the contract was an oral one, as to the Statute of Limitations, because parol evidence was necessary to show that there could be a recovery under the ordinance, saying:

> ''This court has held that a written contract is one in which all of its terms are in writing; that a contract partly in writing and partly oral is in legal effect an oral contract. If parol evidence must be introduced to sustain the action the contract is not in writing under this statute'' (p. 582).

In that case the oral testimony necessary was to show that the ordinance in question had been accepted by plaintiff; that the money had been paid to the City as provided

therein, and that the five year statute of limitations had run against claims for damages against the City as to persons claiming injury from the vacation of the alley.

Novosk v. *Reznick,* 323 Ill. App. 544, 551 (1944), is another case indistinguishable in principle from the case at bar. In that case plaintiffs, as operators of defendants' motor buses sued for the difference between what they received from the defendants and the amount which the defendants contracted in writing with the Works Progress Administration to pay operators. At the trial it was stipulated that plaintiff, Novosk, worked for the defendant, from June 22, 1936, to July 10, 1937, as a bus driver engaged in carrying WPA workers to WPA projects. Novosks' suit was not filed within five years after July 10, 1937. After a review of the Illinois decisions on the question the court held that Novosk's action was barred by section 15 (five year) of the limitations act saying:

> "We are therefore impelled to hold that as parol testimony must be resorted to, to show the existence of a contractual relationship between the plaintiffs and the defendants, plaintiff Novosk's action was barred by the 5-year statute of limitations, not having been commenced within five years from July 10, 1937."

In *Orminski* v. *Hyland Electrical Supply Co.,* 326 Ill. App. 392, 398 (1945), plaintiff brought an action for overtime wages as a truck driver at the hourly rates prescribed for such overtime in written contracts between defendant and plaintiff's labor union. Plaintiff alleged that during the time involved he was a member of the union and was employed as a truck driver by defendant. With reference to the application of the five year statute of limitations the Illinois Appellate Court said the following:

> "After the order of dismissal was entered plaintiff made a motion for a ruling on that part of defendant's motion which sought to strike from the complaint all

claims for overtime not accruing within the five years from the commencement of the action. The court on hearing sustained defendant's motion and held upon the record then before it that plaintiff's action was covered by the five year statute of limitations governing oral contracts, because it would be necessary to resort to parol evidence to show that plaintiff was a member of his union and therefore entitled to the benefits of the contract between defendant and the union. This ruling is correct. *Novosk* v. *Reznick,* 323 Ill. App. 544, 549-551."

Petitioners attempt (p. 13) to distinguish the case of *Novosk* v. *Reznick, supra,* on the ground that the plaintiff, a truck driver, "had no duly constituted, elected representative enter into any negotiated contract for and on his behalf." This is a distinction without a difference. Novosk was a third party beneficiary just as Petitioners are third party beneficiaries in the instant case. Whether the WPA made a contract for the benefit of Novosk, as an elected representative of Novosk, or not would not affect the legal principle involved. Likewise, Petitioners cannot successfully distinguish the case of *Conductors' Benefit Ass'n.* v. *Loomis, supra.* Petitioners are not named or designated as beneficiaries in the contract involved in these proceedings (R. 6 through 10, inclusive) any more than the plaintiff was in the *Loomis* case. Nor are there any promises made in favor of Petitioners.

The six cases referred to on page 12 of Petitioners' brief: *Order of Conductors* v. *Pitney,* 326 U. S. 561; *H. J. Heinz Co.* v. *NLRB,* 311 U. S. 514; *Cleapor* v. *Atlantic, B. and C. R. Co.,* 123 F. 2nd 374; *Howard* v. *C. B. & Q. Ry.,* 146 F. 2nd 316; *Union Pacific R. Co.* v. *Olive,* 156 F. 2nd 737; and *Sanders* v. *L. & N. Ry. Co.,* 144 F. 2nd 485, are from jurisdictions other than Illinois and do not have any bearing upon the question herein presented.

With regard to the three Illinois cases referred to, *Emma Jones, et al.* v. *Supreme Lodge Knights of Honor*, (1908) 236 Ill. 113, is readily distinguishable on the facts. The constitution and by-laws of the defendant organization contained the express written provision that the heirs were entitled to the death benefits of the deceased certificate holder in the event he was not survived by a widow or children. The court, at page 117, said that its decision was in complete harmony with *The Railway Passenger and Freight Conductors' Mutual Benefit Ass'n.* v. *Loomis*, (1892) 142 Ill. 560. In *Electrical Contractors' Association of the City of Chicago* v. *A. S. Schulman Electric Co.*, 391 Ill. 333, all of the provisions of the contract were in writing. The court stated at page 345:

> "The agreement which controls is defendant's request to plaintiff, on February 25th, 1926, to have the name of A. S. Schulman on its records changed to read A. S. Schulman Electric Co., and plaintiff's constitution and by-laws. These are all written, and nothing further is needed to establish the contract."

Economy Fuse & Mfg. Co. v. *Raymond Concrete Pile Co.*, (1940) 111 F. 2nd 875, involved a written contract between the parties to the suit. This case was distinguished by the Circuit Court of Appeals in its decision in the *Kordewick* case.

Petitioners in the instant case have attempted to avoid the adjudication in the *Kordewick* case by re-filing in Indiana. The applicable statute is Burns' Indiana Statutes, 1933, Section 2-601 which provides as follows:

> "The following actions shall be commenced within six (6) years after the cause of action was accrued, and not afterward:
>
> First. On accounts and *contracts not in writing.*" (Italics ours.)

The law of the forum determines whether the action is barred by the Statute of Limitations, and the Federal Courts apply the Statutes of Limitation as interpreted by the highest courts of the state where the action is brought (*Moore* v. *Illinois Cent. R. Co.* (1941) 312 U. S. 630; 615 S. Ct. 754; *Erie Railroad Co.* v. *Tomkins,* (1938) 304 U. S. 64; 58 S. Ct. 817). Under Illinois law, the contract involved is oral. The action, having been commenced nine years and eight months after the last alleged violation, is outlawed.

Conclusion.

This court, except in extraordinary cases, will not review the considered determination of questions of state law by the intermediate federal appellate courts. *Huddleston* v. *Dwyer,* 322 U. S. 232, 237. As recently as April 10, 1950, this court has questioned the policy of the federal courts taking jurisdiction of claims similar to those made by Petitioners. *Slocum* v. *D., L. & W. R. Co.,* ..... U. S. ....., and *Order of Railroad Conductors* v. *Southern Railway Company,* ..... U. S. .....

Despite the contentions made by Petitioners, there is nothing unusual about the decision of the court below. The Circuit Court of Appeals does not ignore the Railway Labor Act or contracts entered into pursuant to its terms.

The decision has nothing to do with collective bargaining rights. Petitioners, like any other plaintiffs seeking damages for breach of an oral contract, must commence their action, if any, within the statutory period provided for by law.

We respectfully urge that the decision of the Circuit Court of Appeals is correct, and that the petition be denied.

Respectfully submitted,

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